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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990.

CARLOS EDUARDO FERNANDEZ,

PETITIONER PRO SE

v.

UNITED STATES OF AMERICA -

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF PURSUANT SUPREME COURT RULE 15.6

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PROCEDURAL HISTORY

The judgement of the court of appeals was entered on October 18, 1990. On January 14, 1991, Justice Souter extended the time for filing a petition for a writ of certiorari to February 15, 1990. The petition for a writ of certiorari was filed on February 14, 1990 Respondent United States sought and was granted an enlargement of time within which to file a Brief in Opposition by April 24, 1991. The Petitioner received a copy of this Brief in Opposition on April 30, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

COUNTER-ARGUMENT TO THE BRIEF
IN OPPOSITION

The Respondent argues to this Court that the "court of appeals [below] correctly recognized that it does not follow that a conviction on a drug conspiracy count must be vacated when a defendant is also convicted on a CCE count, even though a number of courts of appeals have held that a drug conspiracy conviction should be vacated in such a case." See Brief in Opposition (hereafter, "Opp Br.-___") at 6(citing cases).[1.7] The Government observes, in support of its view the court below correctly ruled, that this "Court provided no such relief in Jeffers v. United States, see 432 U.S. at 157-158, and this Court's decision in Ball v. United [470 U.S. 856 (1985)] should not be construed to require such a result." Opp Br. at 6. From the outset, Petitioner would point out that the fact the Court did not order vacatur of the conspiracy drug offense in Jeffers does not support the government's argument that the Third Circuit ruled correctly in the case at bar. At the time Jeffers was decided, the plurality deemed it noteworthy to recapitulate that court of appeals observation that "before this case it was by no means settled law that §846 [of Title 21 U.S.C.] was a lesser incldued offense of § 848." Id. at n.20. That is not now the present context of the law, where, unlike the situation at the time Jeffers was decided, all of the court of appeals[2./], with

1./ The contours of the conflict between the courts of appeals, as to what double jeopardy principles require in the event of conviction for the Continuing Criminal Enterprise Offense (21 U.S.C. § 848 - hereafter,"CCE") and felony drug conspiracy offenses, is described in the Petition (hereafter, "Pet.-__") at 15 thru 18, also, notes 9 thru 14 Ibid.

2./ The minority viewpoints are described in the Petition at at 17, also, notes 9,11-14.

noted exceptions of the second, third and seventh circuits, have held that the felony drug conspiracy violation is a lesser included offense of the CCE offense -- and that double jeopardy principles require that the lesser incldued convictions and sentences be vacated to avoid constitutionally impermissible multiple punishment from transpiring. Cf. Opp Br. at 6 and compare, Pet. at 15 thru 17 (collecting and discussing cases). Moreover, the main reason that conspiracy conviction in Jeffers survived vacatur was not because the Court did not deem the conviction impermissible punishment, but because Jeffers involved a "waiver" problem that deflected the Court from addressing a question of whether the conspiracy conviction itself constituted impermissable multimple punishment for the same offense. The Court determined that Petitioner Jeffers, having been responsible for creating the succesive prosecutions that led, in turn, to the successive convictions and punishment on the CCE and conspiracy offenses, could not be heard to complain of more than than the extent the fines imposed for the CCE and conspiracy exceeded the ceiling for fines authorized for the CCE offense. Id., 432 U.S. 157 ("Our conclusion that Congress did not intend to impose cumulative penalties under §§846 and 848 is of minor significance in this particular case. Since the Government had the right to try petitioner on the § 848 indictment, the court had the power to to sentence him to whatever penalty was authorized by that statute. It had no power, however, to impose on him a fine greater than the maximum"). There is another important reason why Jeffers did not delve into the double jeopardy issue of cummulative punishment presented sub judice. That reason is traceable to the observation by the Court in Jeffers that "both parties, throughout

the proceedings, appear to have assumed that no cumulative punishment problem is present in this case, [however,] the imposition of the separate fines seems squarely to contradict that assumption." Id., 432 U.S. 154-55. It is unremarkable that the Court did not reach further in resolving the relationship between the CCE and conspiracy conviction, as a cummulative punishment matter, further than the "squarely" apparent cummulative punishment problem regarding the multiple fines. History and reason bear witness that it is not the mission of this Court to reach too much further in pronouncing judgements beyond the clearly marked controversies between the parties at bar. Neither the Untied States. nor Petitioner Jeffers, sufficiently joined the issue as has the Petitioner in the case sub judice. There is one additional word that need be said regarding why the failure of the Court in Jeffers to vacate the conspiracy conviction of the petitioner in that case, should not properly be deemed dispositive of the right of the Petitioner sub judice to have this issue confronted and resolved via certiorari review. At the time Jeffers was decided, the Court did not have the current hindsight of jurisprudence that has evolved since that plurality opinion was handed down. Now, the Court has the benefit of its decision in Missouri v. Hunter, 459 U.S. 359, 368 (1983), which teaches that where cummulative punishment is not intended by Congress for offenses that are separately codified, one of the convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense. The Court did not have the benefit of a plethora of courts of appeals which have squarely held that double jeopardy principles require the vacatur of the lesser-included conspiracy convictions, the the greater-CCE offenseis affirmed on direct appeal review. Pet. at 15-17; Opp Br.- 6(citing cases).

Finally on this point; the Court, at the time that Jeffers was decided, did not have available to it the reasoning and authority of Ball v. United States as a lens through which to review (and a tool by which to resolve) the controversy sub judice:[3./]

> "This Court has consistently relied on the test of statutory construction stated in Blockburger v. United States, 284 U.S. 299, 304 (1932), to determine whether Congress intended the same conduct to be punishable under two separate criminal provisions. The appropiate inquiry under Blockburger is whether each provision requires proof of a fact which the other does not. The assumption underlying the Blockburger rule is that Congress ordinarily does not intend to punish the same offense under two different statutes. For purposes of applying the Blockburger test in this setting as a means of ascertaining congressional intent, "punishment" must be the equivalent of a criminal conviction and not simply the imposition of sentence. Congress could not have intended to allow two convictions for the same conduct, even if sentenced under only one; Congress does not create criminal offenses having no sentencing compondent. Id., 470 U.S. at 861 (citations omitted). . .
>
> "Having concluded that Congress did not intend petitior's conduct to be punishable under §§ 922(h) and 1202(a), the only remedy consistent with congressional intent is for the District Court, where the sentencing responsibility resides, to exercise its discretion to vacate one of the underlying convictions. . .One of the convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense." 470 U.S. 864.

3./ At thisjuncture, an important clarification regarding one aspect of the controversy between the parites -- an aspect the misconceives to be non-existent -- is now appropiate. Though the Government concedes "that in light of Jeffers v. United States, supra, it would be error for a court to impose more than a single special assessment for conviction on a CCE count and coterminous conspiracy counts, so the special assessment statute [18 U.S.C. § 3015], if properly applied, should never result in increased penalties for multiple convictions in this setting (Opp Br.- 8);" the Government erroneously states that this error was not committed by the District Court ("the district court did not order a special assessment in this case, so petitioner has suffered no injury on that account," Opp Br.8). The Pro Se Appendix, which includes the transcript of resentencing, A-35-36, demonstrates that the special assessment was reimposed at resentening.

The Government, evading the thrust of the Petitioner's argument that a separate conviction for conspiracy offenses which are coterminous with a CCE offense is Congressionally unintended punishment for the same conduct, i.e., the lesser-included conspiracies vis' a vis' the "in concert with" element of the grater CCE offense,[4./] attempts instead to disguishable Ball from the case sub judice, on the disparate similarity of perceived adverse collateral consequences -- consequences which the Court in Ball stated "may not be ignored." 470 U.S. 865. Opp Br.-8. The Government further contends that the remedy of vacating the conspiracy convictions is inappropiate, because if the CCE offense was reversed for some reason superflous to the vitality of the lesser-included conspiracy, the Petitioner would somehow escape all punishment. For this argument, the Government relies heavily on the Seventh Circuit's decision in United States v. Bond (a case of dubious value for the proposition the Government relies upon it to support, since Bond -- apart from its other shortcommings identified at n. 9 of the Petition -- held that concurrent sentences on the CCE and conspiracy count would not offend double jeopardy: a proposition rejected by every circuit otherthan the Seventh Circuit, Pet., 15-17). The short answer to this argument is that unless Congress intended separate convictions to exist for both conspiracy and CCE convictions, there simply is no authority for permitting the lesser-included offense conviction forthe same conduct to stand consistently with this Court's double jeopardy jurisprudence.

4./ The Government does no dispute that, in the present context of a CCE offense and lesser-included conspiracy offenses which are coterminous, the conspiracies and the "in concert with" element of the CCE offense represent the same conduct. Indeed, Jeffers v. United States, supra, 432 U.S. 148 & n.14 would make such an argument specious, because the Court determined there that "in concert" activity and "conspiracy" are the same thing.

There is no indicia in any of the decisions of this Court -- and the Government glaringly neglects to cite a Supreme Court decision to the effect -- that the double jeopardy of the Fifth Amendment is authority for lower courts to fashion safety nets to prevent a defendant from escaping punishment on a lesser included offense, in the in futuro event the defendant somehow manages to get his greater offense conviction overturned on grounds that do not affect the lesser included offense. It is novel indeed that the Framers, in developing the Fifth Amendment, intended the double jeopardy clause as a device to protect society from a convicted defendants escape from punishment -- punishment, by definition of being the same thing as conduct proscribed by the greater offense, this Petitioner contends that Congress did not intend for him to suffer. May it please the Court to query: has the double jeopardy clause of the Fifth Amendment become such an ephemeral safeguard, that a criminal defendant can be denied its current protection against suffering multiple forms of unintended punishment, on the strength of a future and conjectural possibility-- a possibility not current in controversy in a case before an Article III court -- that a defendant may escape all punishment on his lesser-included offense if the greater offense is somehow overturned? This Petitioner does not think any such proposition can be squared with this Court's double jeopardy jurisprudence. Indeed, soeciety is no more offended by the vacatur of lesser-included offense convictions when the greater offense conviction is affirmed on direct appeal, than it is when lesser included convictions for the same offense, per force of thedouble jeopardy clause, are forever barred once the greater offense conviction has been affirmed on direct appeal. Jeffers v. United States, supra, 432 U.S. 150.

The point that the Government overlooks in its Opposition, is that if Congress did not intend multiple punishment to exist for both a greater and lesser-included offense; only a single punishment is authorized. Hence, if the Court would decide upon certiorari review(as the Petitioner urges), that Congress did not intend for the lesser-included conspiracy convictions to exist coterminously with a conviction on the CCE offense after the same has been affirmed on direct appeal; petitioner would be entitled to have the relief that the majority of the courts of appeals have held a CCE defendant is entitled -- not because it is a matter of "booking keeping" prerogative (as the Government suggests, Opp Br. at 10) --but because this is what Congressional intent and the double jeopardy clause require.

SUMMARY

The rationale of Ball v. United States is relevant to the merits of the Petitioner's case, so long as the Court can determine, as have several lower courts of appeals, that vacating the lesser-included conviction is the only remedy consistent with Congressional intent and the constitutional command of double jeopardy jurisprudence ofthis Court. The Government has identified no case where the conspiracy convictions were vacated, that this was purportedly done on the grounds of "book keeping" vis' a vis' the reasoning of these courts that this is what the double jeopardy jurisprudence of this Court required. Moreover, besides the point of collateral consequences that would inure to the Petitioner's detriment (as in the case in Ball) were the lesser-included conspiracy convictions to remain in force (Pet. at 26); the fact remains that the Government concedes the special assessment penalty is impermissible punishment in this context (Opp Br. at 8); and the record shows that

the Petitioner suffers this impermisible penalty simply because his convictions for the conspiracy offenses remain in force. Pro Se Appendix, A-35-36. The premise upon which the United States would justify this result, i.e., "Unlike the situation in Ball in which discrete status were not directed to separate evils, the narcotics conspriacy statutes of which Fernandez was convicted and the continuing criminal enterprise statute have different purposes (Opp Br. at 4)," fundmentally incorrect. The CCE and conspiracy statutes are not directed to different purposes; rather, these statutes are directed to the same purpose albeit to a different degree of severity: the punishment of confederated narcotics initiatives involving in concert activity. The Government's effort to evade the stricture of Ball, is really old-hat argument that was repudiated soundly by the Court in Jeffers:

> "The Government's principal argument for affirming the judgement of the Court of Appeals is that Ianelli controls this case. Like the conspiracy and gambling statutes at issue in Iannelli, the conspiracy and continuing-criminal-enterprise statutes at issue here, in the Government's view, create two separate offenses under the "same evidence" test of Blockburger. The Government's position is premised on its contention that agreement is not an essential element of the §848 offense, despite the presence in §848(b)(2)(A) of the phrase "in concert with. . . . Section 848(b)(2)(A) restricts the definition of the crime to a continuing series of violations undertaken by the accused "in concert with five or more other persons." Clearly, then, a conviction would be impossible unless concerted activity were present. . . . Even if § 848 were read to require individual agreements between the leader of the enterprise and each of the other five necessary participants, enough would be shown to prove a conspiracy. It would be unreasonable to assume that Congress did not mean anything at all when it inserted these critical words." 5./ Id., 432 U.S. 148.

5./ At n. 14 in Jeffers, supra, the Court pointed out: "Since the "concert" commonly signifies agreement of two or more persons in a common plan or enterprise, a clearly articulated statement from Congress to the contrary would be necessary before that meaning should be abandomed." To-date, Congress has not altered this Court's construction, though § 848 has been amended.

The confusion amongst the lower federal courts of appeals in this intensively litigated area of the criminal law, can be settled only by the Court deciding whether -- as the Petitioner strenously contends (and the majority of lower courts have held) -- conspiracy offenses are lesser-included offenses of the CCE statute. And, if so, whether the"convictions" on the lesser included-conspiracies (particularly in view of the special assessment penalties, but not exclusively so in view of collateral consequences which affect §848 convictees like federal criminal defendants whom have been adjudged guilty of their crimes 6./), constitute unauthorized punishment as the Court determined in Ball. Contra the assertions of the Government, the myriad of opinion on this important question amongst the federal courts of appeals, beckons the need for the type settlement of the law that only the Supreme Court of the United States can provide. Petitioner beseeches the Court to undertake certiorari review in this case and speak to subdue the burgeoning tempest of conflicting opinions of the courts of appeals on these points.

Respectfully submitted,

MAY 2, 1991.

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6./ Cf., United States v. Mendoza, 902 F.2d 693, 697-98 ((8th Cir. 1990)(discussing collateral consequences which flow from maintenance of unintended convictions)

No._____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, pursuant to Supreme Court Rule 29.3, that service of the foregoing "PETITIONER'S REPLY BRIEF PURSUANT TO SUPREME COURT RULE 15.6, was made upon the SOLICITOR GENERAL OF THE UNITED STATES , c/o/ Joel M. Gershowitz, Esquire - Attorney - U.S. Department of Justice, Washington, D.C. 20530, counsel for the Respondent, the United States of America, by depositing the same in the Prisoners Mail Box at the United States Penitentiary, Lewisburg , Pennsylvania, with First Class Postage affixed and pre-paid.

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May 2, 1991.

Clerk of Court
Supreme Court of the United States
Washington, D.C. 20543

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Dear Honorable ClerK:

Please find enclosed the above captioned documents which are submitted for filing and distribution to the Justices as provided for by Supreme Court Rule 15.6.

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Your kind attention to this matter will be appreciated.

Very sincerely yours,

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Enclosures/

cc: Solicitor General of the United States

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